Filed 2/22/13

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

BRENT HUTTON, Plaintiff and Appellant, v. FIDELITY NATIONAL TITLE COMPANY, Defendant and Respondent.	F063318/F063922 (Kern Super. Ct. Nos. CV-269732 & CV-269733) **ORDER MODIFYING OPINION AND DENYING REHEARING [CHANGE IN JUDGMENT]**

THE COURT:

It is ordered that the opinion filed herein on January 31, 2013, be modified as follows:

1. The disposition on page 28 is deleted and the following paragraph inserted in its place:

DISPOSITION

The trial court's order granting defendant's motion for contracted attorney fees and expenses is reversed.[19] In all other respects, the judgment is affirmed. Each party shall bear their own costs.

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[19] This disposition is not intended to deny defendant recovery of statutory costs awarded by the trial court which were not based on contract.

This modification changes the judgment. Defendant's petition for rehearing is denied.

_____
Kane, J.

WE CONCUR:

_____
Gomes, Acting P.J.

_____
Franson, J.

Filed 1/31/13 (unmodified version)

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

BRENT HUTTON,

Plaintiff and Appellant,

v.

FIDELITY NATIONAL TITLE COMPANY,

Defendant and Respondent.

F063318/F063922

(Super. Ct. Nos. CV-269732 & CV-269733)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Sidney P. Chapin, Judge.

R. Rex Parris Law Firm, R. Rex Parris, Alexander R. Wheeler, Jason P. Fowler, Kitty Szeto, Douglas Han, John M. Bickford; Dake, Braun & Monje, Stephen M. Dake and Craig N. Braun for Plaintiff and Appellant.

Hahn Loeser & Parks and Michael J. Gleason for Defendant and Respondent.

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* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of part III.

Plaintiff Brent Hutton sued defendant Fidelity National Title Company, the escrow company used in plaintiff's refinance of his home loan, for allegedly charging a notary fee in excess of the amount permitted by Government Code section 8211.[20] Under that statute, a notary may charge only $10 per signature for "taking an acknowledgment."[21] Since only two acknowledgments were taken by the notary in connection with plaintiff's loan refinance (with only one signature notarized as to each acknowledgement), plaintiff asserted that defendant violated the statute by charging him $75 for services performed by the notary.[22] Based on the supposed overcharge for notary services, plaintiff's complaint set forth causes of action for violation of California's unfair competition law (Bus. & Prof. Code, § 17200 et seq.; the UCL) and unjust enrichment. The complaint was styled as a statewide, multi-year class action on behalf of plaintiff and all others who used defendant's escrow services in real estate or loan refinance transactions and were allegedly overcharged for notary services.

After conducting discovery but before class certification, defendant moved for summary judgment on two principal grounds: (1) The $75 fee was not a violation of section 8211 because that section only limited fees for certain services (e.g., taking acknowledgments) and the notary involved in this case performed many *other* services

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20 Unless otherwise indicated, all further statutory references are to the Government Code.

21 For convenience, we refer to a "notary public" as simply a notary. The relevant portion of section 8211 states: "Fees charged by a notary public for the following services shall not exceed the fees prescribed by this section. [¶] (a) For taking an acknowledgment or proof of a deed, or other instrument, to include the seal and the writing of the certificate, the sum of ten dollars ($10) for each signature taken."

22 The complaint alleged the fee was $125, but that was merely an estimated amount in a preclosing statement. It was undisputed that the actual amount charged was $75. It was also undisputed that two acknowledgements were taken by the notary, one for a deed of trust and another for an interspousal transfer deed, each document having a single notarized signature.

(i.e., traveling to location of signing, presenting multiple documents for signature, showing where to sign or initial each document, answering questions, etc.) and (2) The $75 fee was charged and retained by a third party independent contractor, not by defendant, even though defendant as escrow holder disbursed the funds for such services. The trial court granted defendant's motion for summary judgment on both grounds. Plaintiff appeals from the resulting judgment. We find the first ground noted above to be dispositive and conclude on that basis that the trial court properly granted summary judgment.[23] Plaintiff also appeals from the trial court's postjudgment order granting an award of attorney fees to defendant pursuant to a contractual provision in the escrow instructions. Plaintiff contends that said provision should not have been enforced because it was unconscionable. We agree with plaintiff on that issue and reverse the trial court's order granting attorney fees. In all other respects, the judgment below is affirmed.

FACTS AND PROCEDURAL HISTORY

Plaintiff's Complaint

On February 26, 2010, plaintiff filed his complaint against defendant to obtain remedies for alleged violation of the UCL and unjust enrichment. According to the complaint, section 8211 made it unlawful for defendant to charge in excess of $10 for each notarized signature on a deed or deed of trust. In providing escrow services in connection with plaintiff's loan refinance, defendant allegedly billed a predetermined notary charge that exceeded the amount prescribed in section 8211. That same practice by defendant allegedly resulted in other persons (class members) being overcharged by defendant for notary services in connection with other real estate or loan refinance transactions. The complaint explained further: "The law could not be simpler.

[23] Since the first ground is dispositive, we find it unnecessary to address the second ground (i.e., the notary's independent contractor status).

California Government Code Section 8211 sets a cap on notarization fees. Under Section 8211[, subdivision](a), it is illegal to charge more than $10 per notarized signature on each deed or deed of trust used in a specific Real Estate Transaction. [¶] … [Defendant] charged … more than $10 per signature. Thus, [Defendant] violated the law." Based on these core facts, plaintiff alleged a first cause of action labeled as unfair business practices (elsewhere more specifically identified by plaintiff as a UCL cause of action) and a second cause of action for unjust enrichment. Both causes of action were explicitly premised upon defendant's alleged overcharge for notary fees in violation of section 8211.

Defendant's Motion for Summary Judgment

On December 23, 2010, defendant filed its motion for summary judgment. We have already summarized above the grounds upon which that motion was made. In support of the first ground for the motion (i.e., that section 8211 was not violated), defendant presented, among other evidence, the declaration of the individual notary who was involved in the document signing in this case—namely, Lauri E. Kilpatrick (Kilpatrick). In her declaration, Kilpatrick described a variety of services that she typically provided in connection with the signing of loan refinance documents in her capacity as a notary and a "certified signing agent" (or CSA). As a CSA, she is familiar with the various documents necessary in the loan closing process and is able to answer questions. Her declaration stated: "Generally, during a loan closing, I will (a) present all of the loan documents to the borrower which generally consists of about 60 to 150 pages, (b) make all necessary disclosures required by those loan documents, (c) explain the purpose of each loan document, (d) answer any questions the borrower may have about the loan documents or the loan closing process in general, (e) indicate where the borrower must sign each loan document, and (f) take an acknowledgment of the borrower's signature when necessary. *I provided these services for Mr. Hutton's 2007 refinance closing*. [¶] … The majority of my loan signings are mobile loan signings

where I will travel to the borrower's home, the lender's office, or the escrow holder's office." (Italics added.) Of the services mentioned by Kilpatrick, the taking of acknowledgments (or the notarizing of signatures) was merely one minor part. Defendant's motion noted plaintiff's testimony in which he (plaintiff) recalled that "a lady" (Kilpatrick) came to his home to conduct the signing of plaintiff's 2007 loan refinance papers, but he recalled little else about it.[24] Defendant's motion also pointed out that the $75 charge, as it appeared in the closing statement (the HUD-1 form), included an explicit reference to the fact that Kilpatrick was also a CSA. Specifically, the HUD-1 form stated: "Notary to Lauri Kilpatrick, APN & CSA."

In support of the second ground for the motion, defendant presented evidence that Kilpatrick was an independent contractor who charged and retained the entire fee, and that she was not an agent or employee of defendant.[25] Preliminarily, defendant asserted that as an escrow company, it frequently made use of third party mobile notaries (like Kilpatrick) for loan closings. Defendant did so for several reasons, including that it freed up their escrow officers for other critical tasks since loan signings may take one to two hours, and because loan signings often involved travel to the borrower's residence and often occurred outside of normal business hours to accommodate a borrower's schedule. Defendant disbursed a check to Kilpatrick for $75 after she submitted an invoice for a "loan signing." Defendant's evidence showed that Kilpatrick was an independent contractor doing business since 2005 as "A Good Deed Document & Notary Service." Kilpatrick was on defendant's approved list of third party notaries for closing loans,

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[24] Plaintiff testified the signing occurred at his house, while Kilpatrick recalled that it took place at the escrow company. Either way, she was traveling from her own business office to a suitable place to perform the signing.

[25] Defendant's motion was also made on a third ground to the effect that the dispute should have been referred to the Secretary of State. That contention is not before us in this appeal.

based in part on her completion of a "Notary Approval Request" packet that included an "Independent Contractor Status Test." Defendant further asserted that Kilpatrick had her own business office, had other clients besides defendant, made her services available to other escrow companies, set her own hours and did not take instructions from defendant on how to perform her essential work. At a typical loan signing, Kilpatrick's practice was to disclose to the borrower that she was an independent contractor and was not an employee of the lender or the escrow holder.

Plaintiff filed opposition to the motion for summary judgment, arguing that the fees charged were unlawful under section 8211 even if other services were provided because, allegedly, the only essential *notary* function performed was the taking of two acknowledgments and the HUD-1 described the fee as "Notary to Lauri Kilpatrick, APN & CSA." Plaintiff's opposition further argued that even if the fees were not unlawful, they were potentially *unfair* or *fraudulent* under the UCL because (1) defendant did not itemize or disclose the various services being provided and (2) Kilpatrick's answering of questions would constitute the unauthorized practice of law. According to plaintiff, since defendant's motion did not negate these other potential theories, defendant did not meet its initial burden as the moving party. Additionally, plaintiff's opposition argued that there were triable issues of fact whether Kilpatrick was defendant's agent, based in part on defendant's guidelines regarding its approved notaries, which guidelines may, according to plaintiff, indicate a degree of control over the manner of performing services. For these and other reasons, plaintiff argued that the motion for summary judgment should be denied.

Defendant's reply in support of its motion responded that *all* of plaintiff's claims were premised on violation of section 8211 and that no other theories were alleged in the complaint. Since in summary judgment proceedings the material issues are framed and limited by the pleadings, defendant's reply insisted it was not necessary for defendant to negate theories that were not pled. Additionally, defendant argued that the material facts

showing Kilpatrick to be an independent contractor were not in dispute and, therefore, that issue could properly be decided as a matter of law.

The hearing of the motion for summary judgment was held on March 14, 2011. Following oral argument, the trial court took the matter under submission. On May 13, 2011, the trial court issued its written order granting the motion for summary judgment. The court granted the motion because "no overcharge occurred as … [section] 8211 only sets a price for taking an acknowledgment," and it "does not limit what notaries can charge for services which are not listed in that statute." Secondly, the trial court concluded that Kilpatrick was a third party independent contractor and, therefore, defendant was not liable even if there was an overcharge. On June 17, 2011, the trial court entered judgment in favor of defendant. Plaintiff timely appealed from that judgment.

Defendant's Motion for Attorney Fees

The judgment entered below made defendant the prevailing party in the action. On August 8, 2011, defendant moved for an award of attorney fees based on a provision in the escrow instructions. Defendant's motion requested $266,801 in attorney fees. Defendant argued that this sum, though large, was reasonable in light of the fact that plaintiff had aggressively litigated and engaged in extensive and wide-ranging discovery, which treated the case as a multi-year, statewide class action, even though there had been no class certification. Defendant substantiated the actual amount of time spent in defending the litigation by submitting declarations and copies of billing statements or invoices.

Plaintiff objected to the enforcement of the attorney fees provision, contending it was so oppressive and one-sided that it was unconscionable. Plaintiff also objected that the amount of attorney fees requested was unreasonable. The motion was heard on September 1, 2011, and following oral argument the trial court took the matter under submission. On October 21, 2011, the trial court granted the motion and awarded

defendant attorney fees in the sum of $266,801. Plaintiff then separately appealed from the order granting attorney fees, and the two appeals were consolidated by this court.

DISCUSSION

I. Summary Judgment Law and Standard of Review

We begin with the summary judgment motion. Summary judgment is appropriate when all of the papers submitted show there is no triable issue of material fact and the moving party is entitled to a judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) "The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.)

A defendant may move for summary judgment if it is contended that the action has no merit. (Code Civ. Proc., § 437c, subd. (a).) A defendant moving for summary judgment has the initial burden of showing a cause of action is without merit. A defendant meets that burden by showing that one or more elements of the cause of action cannot be established, or that there is a complete defense thereto. (*Id*., subd. (p)(2).) If the defendant makes such a showing, the burden shifts to the plaintiff to produce evidence demonstrating the existence of a triable issue of material fact. (*Ibid*.; *Aguilar v. Atlantic Richfield Co*., *supra*, 25 Cal.4th at p. 849.)

The pleadings play a key role in a summary judgment motion. "'The function of the pleadings in a motion for summary judgment is to delimit the scope of the issues'" and to frame "the outer measure of materiality in a summary judgment proceeding." (*FPI Development, Inc. v. Nakashima* (1991) 231 Cal.App.3d 367, 381.) As our Supreme Court has explained it: "The materiality of a disputed fact is measured by the pleadings [citations], which 'set the boundaries of the issues to be resolved at summary judgment.' [Citations.]" (*Conroy v. Regents of University of California* (2009) 45 Cal.4th 1244, 1250 (*Conroy*).) Accordingly, the burden of a defendant moving for summary judgment

only requires that he or she negate plaintiff's theories of liability *as alleged in the complaint*; that is, a moving party need not refute liability on some theoretical possibility not included in the pleadings. (*Id*. at pp. 1254-1255; *County of Santa Clara v. Atlantic Richfield Co*. (2006) 137 Cal.App.4th 292, 332; *Lockhart v. County of Los Angeles* (2007) 155 Cal.App.4th 289, 304; see also *Melican v. Regents of University of California* (2007) 151 Cal.App.4th 168, 182 ["We do not require [defendant] to negate elements of causes of action plaintiffs never pleaded."].)

Furthermore, """"[t]he [papers] filed in response to a defendant's motion for summary judgment may not create issues outside the pleadings and are not a substitute for an amendment to the pleadings.'"' [Citation.]" (*County of Santa Clara v. Atlantic Richfield Co.*, *supra*, 137 Cal.App.4th at p. 332.) An opposing party's separate statement is not a substitute for amendment of the complaint. (*Lackner v. North* (2006) 135 Cal.App.4th 1188, 1201-1202, fn. 5.) Similarly, """[d]eclarations in opposition to a motion for summary judgment 'are no substitute for amended pleadings.' … If the motion for summary judgment presents evidence sufficient to disprove the plaintiff's claims, … the plaintiff forfeits an opportunity to amend to state new claims by failing to request it.'" [Citations.]" (*Conroy*, *supra*, 45 Cal.4th at p. 1254.)

On appeal from a summary judgment, our task is to independently determine whether an issue of material fact exists and whether the moving party is entitled to summary judgment as a matter of law. (*Brantley v. Pisaro* (1996) 42 Cal.App.4th 1591, 1601.) "We independently review the parties' papers supporting and opposing the motion, using the same method of analysis as the trial court. Essentially, we assume the role of the trial court and apply the same rules and standards." (*Kline v. Turner* (2001) 87 Cal.App.4th 1369, 1373.) We apply the same three-step analysis required of the trial court. First, we identify the issues framed by the pleadings since it is these allegations to which the motion must respond. Second, we determine whether the moving party's showing has established facts which negate the opponent's claim and justify a judgment

in the moving party's favor. When a summary judgment motion prima facie justifies a judgment, the third and final step is to determine whether the opposition demonstrates the existence of a triable issue of material fact. (*Hamburg v. Wal-Mart Stores, Inc*. (2004) 116 Cal.App.4th 497, 503; *Chevron U.S.A., Inc. v. Superior Court* (1992) 4 Cal.App.4th 544, 548.) In so doing, we liberally construe the opposing party's evidence, strictly construe the moving party's evidence, and resolve all doubts in favor of the opposing party. (*Johnson v. American Standard, Inc*. (2008) 43 Cal.4th 56, 64; *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768.)

II. Summary Judgment Was Properly Granted

A. Defendant's Burden as Moving Party Was Satisfied

In this case, the trial court acknowledged that plaintiff's narrowly framed causes of action limited the issues that had to be addressed by defendant's summary judgment motion. According to the trial court, the *only* theory of liability alleged in the complaint was that defendant overcharged plaintiff for notary services and retained the benefits thereof. That is, plaintiff's entire complaint was premised on the assumption that section 8211, subdivision (a), was violated in this case when plaintiff was charged $75 for Kilpatrick's services. When defendant's motion presented evidence showing that Kilpatrick provided many other services at the loan signing besides merely taking two acknowledgments, the trial court concluded that plaintiff's causes of action were without merit based on that showing *and* the clear language of the statute. According to the trial court, section 8211 does not limit what may be charged "for services which are not listed in that statute." We agree with that analysis.

In the discussion that follows, we shall break down defendant's (and the trial court's) reasoning into three logical steps: (1) the meaning of section 8211, (2) the limited scope of plaintiff's pleading, and (3) defendant's evidentiary showing as the moving party successfully defeating the causes of action as pled. When each step is

considered, it will serve to highlight that defendant met its initial burden as the moving party. Afterwards, we will address the matters presented in plaintiff's opposition.

1. Section 8211

Section 8211 states, in relevant part, that "[f]ees charged by a notary public *for the following services* shall not exceed the fees prescribed by this section." (Italics added.) Included in the list of services regulated by section 8211 is the fee "[f]or taking an acknowledgment." (*Id*., subd. (a).)[26] It is plain on the face of the statute that it sets fees only for certain types of services performed by a notary—namely those services listed in the statute. Conversely, the statute does not regulate fees for any services not mentioned in the statute.[27] "'It is a prime rule of construction that the legislative intent underlying a statute must be ascertained from its language; if the language is clear, there can be no room for interpretation, and effect must be given to its plain meaning. [Citations.]'" (*Mutual Life Ins. Co. v. City of Los Angeles* (1990) 50 Cal.3d 402, 412.) We conclude the trial court correctly recognized the clear meaning of this statute.

2. The Pleadings

Throughout plaintiff's complaint, the sole basis for liability was the claim that defendant violated section 8211 and thus overcharged plaintiff. For example, in the introductory general allegations, plaintiff's complaint alleged that section 8211 "adopts a specific regulatory scheme which establishes specific limits on the amount of fees that

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26 Section 8211, subdivision (a), states: "For taking an acknowledgment or proof of a deed, or other instrument, to include the seal and the writing of the certificate, the sum of ten dollars ($10) for each signature taken."

27 As noted by defendant, current materials produced by the California Secretary of State's Office, entitled "Notary Public Disciplinary Guidelines," indicated in a hypothetical example relating to application of section 8211 that a notary may charge for travel expenses, as long as he or she actually did travel. (Cal. Sec. of State, Notary Public Disciplinary Guidelines (Nov. 2012) p. 19.) Travel is not among the charges expressly listed in section 8211.

can be charged for notarizing documents." Allegedly, plaintiff was charged a predetermined notary fee that was contrary to section 8211. As to plaintiff's loan transaction, defendant allegedly charged a predetermined fee of $125 "even though only [two] signature[s were] notarized in Plaintiff's Real Estate Transaction."[28] According to the complaint, defendant "violated California law by overcharging Plaintiff more than $100 for notarizing the deed of trust which Plaintiff signed," and defendant thereby "engaged in unlawful business practices and unjustly enriched [itself] by overcharging" plaintiff. Based on these allegations of fact, the complaint goes on to specify the common question of law involved in the case: "The law could not be simpler. California Government Code Section 8211 sets a cap on notarization fees. Under Section 8211[, subdivision](a), it is illegal to charge more than $10 per notarized signature on each deed or deed of trust used in a specific Real Estate Transaction. [¶] … [Defendant] charged … more than $10 per signature. Thus, [Defendant] violated the law."

Further, as to the first cause of action (the UCL claim labeled as "Unfair Business Practices"), the complaint alleged that the basis for that claim was as follows: "[Defendant] engaged in unlawful, unfair or fraudulent business acts and practices. *Namely, [Defendant] overcharged Plaintiff* … by assessing and collecting set Notary Fees in each Real Estate Transaction irrespective of the number of signatures actually notarized. Plaintiff … [was] *charged more than California law allowed*, and thus lost money due to [Defendant's] *unlawful* business practices." (Italics added.) As to the second cause of action (for "Unjust Enrichment"), the complaint alleged that the basis for that claim was as follows: "California Government Code Section 8211[, subdivision](a) sets a cap on notarization fees. *Under Section 8211[, subdivision](a), it is illegal to*

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28 Actually, the amount charged to plaintiff was $75; the $125 amount was set forth in a preliminary estimated statement of closing fees. This correction was brought to light in the summary judgment motion, and was not disputed.

charge more than $10 per notarized signature. [Defendant], *through violating California law*, unjustly enriched [itself] at the expense of Plaintiff …." (Italics added.)

We conclude from these allegations that plaintiff's entire complaint was founded on one, and only one, theory of liability: that defendant overcharged plaintiff for notary services under the provisions of section 8211, subdivision (a). As the trial court correctly held, "[b]ased on the causes of action *alleged*, Plaintiffs *only* make a claim that [defendant] overcharged them for the notary fees." (Italics added.) Since that was the exclusive theory of liability pleaded by plaintiff, it was all that had to be addressed by defendant's motion for summary judgment. (*County of Santa Clara v. Atlantic Richfield Co., supra*, 137 Cal.App.4th at pp. 332-333 [theories not pleaded by plaintiff need not be addressed in defendant's motion under Code Civ. Proc., § 437c].)

3. Defendant's Factual Showing

As noted above, in meeting the issue of the alleged overcharge under section 8211, defendant's motion demonstrated that Kilpatrick, who was both a notary and a CSA, provided a number of signing services in connection with plaintiff's loan refinance in addition to merely taking the two acknowledgements. Among other things, it was shown that Kilpatrick presented the various loan documents for signature, read the mandatory disclosures, explained the purpose of loan documents, indicated where the borrower must sign on each document, and answered questions. In short, she traveled to the place of the signing (which plaintiff recalled was his home) and facilitated the closing of the loan by obtaining the necessary signatures on all of the documents in a careful, step-by-step process, including answering questions. While the assistance and service provided by Kilpatrick included the taking of two acknowledgments (each with one notarized signature), her performance of that intrinsically notarial act was merely one part of the overall signing services she provided.

More than that, Kilpatrick's deposition testimony and her official notary journal evidenced that when she took the two acknowledgements in connection with plaintiff's

loan refinance signing, she recorded in her notary journal the fee of $10 per notarized signature. Further, Kilpatrick's testimony made clear that she understood $10 per notarized signature was all she could charge for that particular function, notwithstanding the fact that the total fee she billed for the entirety of her signing services was a flat fee of $75, which was not broken down or itemized.[29] A reasonable inference may be drawn from this evidence that plaintiff was charged only $10 per signature for the two acknowledgments, as set forth in Kilpatrick's notary journal, and that the total signing fee of $75 was attributable to the fact that many other services were performed by Kilpatrick.[30]

In conclusion, because section 8211 only limited fees for the services specifically listed therein and did not prohibit remuneration for other services rendered, defendant's evidentiary showing was sufficient to prima facie negate plaintiff's claim that defendant allegedly violated the statute by charging $75. Plaintiff's complaint assumed that the $75 charged was for taking two acknowledgments, but defendant showed that it was instead for a variety of loan signing services provided by Kilpatrick. We conclude that defendant met its burden as the moving party.

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29 We may consider this evidence in deciding whether defendant's burden was met, even though it was submitted in plaintiff's opposition. (See *Villa v. McFerren* (1995) 35 Cal.App.4th 733, 749-751 [in determining whether the defendant's burden of production was met, the court may consider evidence supplied by the plaintiff's opposition that filled a gap in the defendant's showing]; *Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1267 [same]; Code Civ. Proc., § 437c, subd. (c) ["all" the papers considered].)

30 In defendant's reply, defendant noted Kilpatrick's deposition testimony that during the signing of the loan documents, plaintiff's wife (who was also a notary) asked about the fee being more than $10, and Kilpatrick explained that it was not a mere notarization but a loan signing, which was different.

B. Plaintiff's Opposition

Plaintiff argued in his opposition to the motion, as he does on appeal, that even if defendant negated plaintiff's claim for violation of section 8211, defendant nevertheless failed to meet its burden as the moving party since there were other potential theories of liability available to plaintiff that defendant's motion did not address. Plaintiff also asserted that evidence referenced in his opposition was sufficient to create a triable issue of material fact. We now address these arguments.[31]

1. Other Theories Were Not Pled

In arguing that defendant did not address certain *other* potential causes of action, plaintiff's appeal emphasizes that the UCL has three separate grounds of liability. That is a correct statement of the law. (See Bus. & Prof. Code, § 17200.) "Since section 17200 is in the disjunctive, it establishes three separate types of unfair competition. The statute prohibits practices that are either 'unfair,' or 'unlawful,' or 'fraudulent.' [Citation.]" (*Pastoria v. Nationwide Ins*. (2003) 112 Cal.App.4th 1490, 1496.) Plaintiff argues that it stated a cause of action for potential *unfair* or *fraudulent* practices because (1) the HUD-1 form or other documents provided by defendant did not itemize and disclose the specific services that were billed for notary or CSA services performed by Kilpatrick and (2) Kilpatrick's conduct of answering questions about loan documents constituted the unlawful practice of law. Whatever we may think about the viability of such theories, the problem for plaintiff at this stage is that no such claim or cause of action was ever alleged.

In an effort to persuade us that these theories were somehow pled, plaintiff notes that the first cause of action included a statement that defendant's conduct was "unlawful,

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31 Plaintiff also argued that section 8211 had an itemization requirement, but the language of that section plainly does not say anything about itemization, and we decline to insert a duty that is not in the statute.

unfair or fraudulent." But that was a bare conclusion, not the factual basis of a cause of action. Moreover, we cannot ignore that the next sentence of the complaint made it unmistakably clear that the first cause of action was based solely on "unlawful" conduct. It stated, as we previously noted above, as follows: "*Namely*, [Defendant] *overcharged* Plaintiff … by assessing and collecting set Notary Fees in each Real Estate Transaction irrespective of the number of signatures actually notarized. Plaintiff … [was] *charged more than California law allowed*, and thus lost money due to [Defendant's] *unlawful* business practices." (Italics added.) Likewise, the second cause of action for unjust enrichment was premised exclusively on the identical unlawful conduct—that is, on the claim that defendant charged more than what section 8211 permitted, and "through violating [that] California law, unjustly enriched [itself] …." Plainly then, the actionable wrongdoing for which relief was sought in the complaint was not a failure to disclose or itemize, nor a notary's unauthorized practice of law, but that of overcharging plaintiff by exceeding the amount permitted under section 8211.

Finally, plaintiff tries to make something of the fact that the concept of itemization was briefly mentioned in the complaint. That is, the complaint alleged that defendant did not compute notary fees based on an itemization of the total number of notarized signatures taken in a transaction, but instead defendant billed a predetermined "block" amount. But that allegation was simply a description of the process by which defendant allegedly *overcharged* plaintiff under section 8211, with the overcharge itself being the sole basis of the cause of action in the pleading. In conclusion, nothing in the allegations of the complaint indicated that insufficient disclosure or itemization, or unauthorized practice of law by a notary, constituted the actionable wrongdoing on defendant's part for which relief was sought. No such causes of action were alleged.

What we said at the outset of our discussion bears repeating here: For purposes of a summary judgment motion, the pleadings set the boundaries of the issues to be resolved. (*Conroy*, *supra*, 45 Cal.4th at p. 1250.) Defendant, therefore, met its burden as

the moving party when it negated the sole basis of plaintiff's claims—namely, the alleged excessive notary fee under section 8211. It was not incumbent on defendant to refute liability on some theoretical possibilities not included in the pleadings. (*Conroy, supra,* at p. 1254; *County of Santa Clara v. Atlantic Richfield Co., supra,* 137 Cal.App.4th at p. 332.) Each of the suggested *other* grounds for liability argued by plaintiff were simply theoretical possibilities that were not included in the pleadings. Finally, plaintiff cannot use his opposition papers as a substitute for an amended pleading, and his failure to seek an amendment below forfeits the issue. (*Conroy, supra,* at p. 1254; *County of Santa Clara v. Atlantic Richfield Co., supra,* at pp. 333; *Lackner v. North, supra,* 135 Cal.App.4th at pp. 1201-1202, fn. 5.)

2. No Triable Issue of Fact

Nothing in plaintiff's opposition papers created a triable issue of fact on the present ground for the motion. Indeed, most of the opposition evidence went to the separate issue of whether or not Kilpatrick was an agent of defendant, or to show purported theories of liability that were not alleged in the pleadings. Since defendant met its burden as the moving party, and plaintiff failed to demonstrate the existence of a triable issue of fact, we conclude that summary judgment was properly granted. (Code Civ. Proc., § 437c, subd. (c) & (p)(2).)[32]

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32 Plaintiff's appeal also claims the trial court erred when it did not sustain his evidentiary objections to certain statements in two of the declarations submitted by defendant. Plaintiff has failed to adequately demonstrate error, since a party's understanding of the nature of his or her employment relationship would not be irrelevant to that issue (*Lara v. Workers' Comp. Appeals Bd.* (2010) 182 Cal.App.4th 393, 399), and other facts and circumstances were provided to support that understanding. Therefore, no bare conclusions as to Kilpatrick's independent contractor status were made. In any event, the particular statements to which plaintiff objected did not impact the ground upon which we have affirmed the summary judgment.

III. Attorney Fees Provision Was Unconscionable[*]

Defendant, as prevailing party, moved for recovery of its attorney fees pursuant to a provision in the parties' escrow instructions. Plaintiff objected to enforcement of that provision on the ground that it was unconscionable. In its written order following the hearing, the trial court granted the motion and awarded to defendant the sum of $266,801 as a recovery of its attorney fees. We treat the trial court's order granting the motion as an implicit rejection of plaintiff's contention that the attorney fees provision was unconscionable.[33] Plaintiff's appeal argues the trial court erred on that issue. We agree.

A. Standard of Review

"Unconscionability is ultimately a question of law for the court." (*Flores v. Transamerica HomeFirst, Inc*. (2001) 93 Cal.App.4th 846, 851, citing Civ. Code, § 1670.5.) "However, numerous factual issues may bear on that question**.** [Citation.] Where the trial court's determination of unconscionability is based upon the trial court's resolution of conflicts in the evidence**,** or on the factual inferences which may be drawn therefrom, we consider the evidence in the light most favorable to the court's determination and review those aspects of the determination for substantial evidence**.** [Citations.]" (*Gutierrez v. Autowest, Inc.* (2003) 114 Cal.App.4th 77, 89.) To the extent that there are no material conflicts in the evidence bearing on the issue of unconscionability, our review is de novo. (*Higgins v. Superior Court* (2006) 140 Cal.App.4th 1238, 1250.)

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[*] See footnote, *ante*, page 1.

[33] The order did not mention the issue of unconscionability.

B. The Contract Provision and Other Evidence

The subject attorney fees provision, which was set forth in paragraph 14 of the general provisions of the escrow instructions, stated as follows:

> "In the event that a suit is brought by any party or parties to these escrow instructions to which the Escrow Holder is named as a party which results in a judgment in favor of the Escrow Holder and against a principal or principals herein, the principals or principals' agent agree to pay said Escrow Holder all costs, expenses and reasonable attorney's fees which it may expend or incur in said suit, the amount thereof to be fixed and judgment therefore to be rendered by the court in said suit."

In opposing the motion for attorney fees, plaintiff's declaration described the circumstances of signing the escrow instructions on February 5, 2007. He stated that he "did not personally choose to use [defendant]" as the escrow company for the loan refinance, nor was he given any other options. He signed "all" of the loan paperwork in front of the notary selected by defendant, who presented "approximately forty (40) standard loan forms to sign." The forms were presented for signature in order for plaintiff to obtain his loan refinance, and were presented to him by the notary for "quick signature." As form after form was put forward for plaintiff's signature, plaintiff did not attempt a detailed review of each document, nor did he believe there was sufficient time to do so. Moreover, plaintiff did not believe he could "pick and choose which forms to sign" or "cross out any pre-printed paragraphs that [he] did not agree with." Rather, he believed that in order to obtain his loan refinance, he had to sign all of the documents presented to him, including the escrow instructions. Defendant never told him otherwise, nor did defendant indicate that any of the preprinted general provisions in the escrow instructions were negotiable. Further, plaintiff's declaration stated that he had no idea the escrow instructions contained a paragraph that required him to "pay all of [defendant's] attorneys' fees for whatever type of claim I may have against it." He asserted that had he known about that provision, he would never have signed the escrow instructions.

Defendant's reply in support of its attorney fees motion argued that the matters asserted in plaintiff's declaration were too conclusory to adequately support a finding of unconscionability. Defendant noted that, contrary to plaintiff's declaration, plaintiff had testified previously that he did not recall whether the notary had offered to answer questions or whether she had explained any documents to him. Defendant's reply also referred to Kilpatrick's declaration (utilized by defendant in the summary judgment motion), indicating that Kilpatrick had summarized the nature of the documents to be signed and offered to answer questions. Additionally, in arguing against unconscionability, defendant claimed that Civil Code section 1717 would make the one-sided attorney fees provision mutual.

The trial court's order did not expressly address the issue of unconscionability, but simply stated: "[Defendant's] motion is hereby granted. [Defendant] is contractually entitled to be recompensed for attorney fees and expenses. [Defendant] reasonably incurred $266,801 in attorney's fees and expenses. Hence, Plaintiff or his agents shall recompense [Defendant] $266,801 in attorneys' fees and expenses …."

C. Overview of Law of Unconscionability

A court may deny enforcement of a contractual provision that is determined to be unconscionable. "If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result." (Civ. Code, § 1670.5, subd. (a).)

Our Supreme Court recently summarized the law of unconscionability in *Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223 (*Pinnacle*), as follows: "Unconscionability consists of both procedural and substantive elements. The procedural element addresses the circumstances of contract negotiation and formation, focusing on oppression or surprise due to unequal bargaining power.

[Citations.] Substantive unconscionability pertains to the fairness of an agreement's actual terms and to assessments of whether they are overly harsh or one-sided. [Citations.] A contract term is not substantively unconscionable when it merely gives one side a greater benefit; rather, the term must be 'so one-sided as to "shock the conscience."' [Citation.]" (*Id*. at p. 246; see also *Little v. Auto Stiegler, Inc*. (2003) 29 Cal.4th 1064, 1071 (*Little*) [procedural unconscionability "generally takes the form of a contract of adhesion"]; *Armendariz v. Foundation Health Psychcare Services, Inc*. (2000) 24 Cal.4th 83, 113-114 (*Armendariz*).)[34]

"Both procedural unconscionability and substantive unconscionability must be shown, but 'they need not be present in the same degree' and are evaluated on '"a sliding scale."' [Citation.] '[T]he more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.' [Citation.]" (*Pinnacle, supra*, 55 Cal.4th at p. 247, citing *Armendariz, supra*, 24 Cal.4th at p. 114.)

D. Application

We now consider whether the attorney fees provision at issue was unconscionable and, therefore, unenforceable. We do so by evaluating whether plaintiff showed both the procedural and the substantive elements of unconscionability.

1. Procedural Unconscionability

As indicated above, procedural unconscionability requires either *oppression* or *surprise*. """Oppression occurs where a contract involves lack of negotiation and

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34 The procedural/substantive approach was first given clear articulation in the case of *A&M Produce Co. v. FMC Corp*. (1982) 135 Cal.App.3d 473, 485-493 (*A&M Produce*), and was viewed as an alternative to the approach taken previously in *Graham v. Scissor-Tail, Inc*. (1981) 28 Cal.3d 807, 817-820. (See *Morris v. Redwood Empire Bancorp* (2005) 128 Cal.App.4th 1305, 1316-1320 [summarizing development of two analytical approaches to unconscionability].)

meaningful choice, surprise where the allegedly unconscionable provision is hidden within a prolix printed form.'" [Citation.]" (*Pinnacle, supra,* 55 Cal.4th at p. 247.) Procedural unconscionability, and in particular "'oppression,'" generally entails a *contract of adhesion*; that is, "'a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it.'" (*Armendariz, supra*, 24 Cal.4th at p. 113; see also *Walnut Producers of California v. Diamond Foods, Inc*. (2010) 187 Cal.App.4th 634, 645-646.) "'[S]urprise'" typically involves a provision """"hidden""" within the prolixness of a preprinted form contract drafted by the party having superior bargaining strength. (*Baker v. Osborne Development Co*. (2008) 159 Cal.App.4th 884, 895; *A&M Produce, supra*, 135 Cal.App.3d at p. 486; *Armendariz, supra*, at p. 114.)

Here, we conclude that procedural unconscionability existed based on *surprise* created by defendant escrow company. Preliminarily, we agree with plaintiff that in his situation as an individual homeowner or consumer seeking to refinance his home loan, the lender-approved escrow company handling the signing and escrow settlement process (i.e., defendant) was in a superior bargaining position. (See *Akin v. Business Title Corp*. (1968) 264 Cal.App.2d 153, 157 [recognizing escrow company generally has superior bargaining strength over customers needing its services].) Further, the escrow instructions were, to a significant extent, adhesive in the sense that they were set forth in a form contract imposed on plaintiff, the weaker party, and the disputed attorney fees provision was neither known to nor negotiated by plaintiff.[35] (See *Morris v. Redwood*

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35 On the issue of adhesion, plaintiff's declaration was conclusory in asserting his inability to negotiate or cross out preprinted terms on the standardized form. He believed he could not do so, at least not without risking the loss of his refinancing, but he never affirmatively tested that belief by inquiring or attempting to negotiate. Nevertheless, we believe the attending circumstances were such that plaintiff reasonably understood that the preprinted documents were presented for his signature in a take it or leave it fashion. That is, the preprinted forms were submitted to plaintiff as what he would need to sign,

Empire Bancorp, supra, 128 Cal.App.4th at p. 1319, applying *Armendariz, supra*, 24 Cal.4th at p. 113.)

As to the specific issue of surprise, plaintiff demonstrated that the attorney fees provision was hidden or obscured in more than one way. First, there was the signing process itself. The record showed that during the signing event (conducted by the notary selected by defendant), plaintiff was presented in one sitting with approximately 40 preprinted forms for his signature in order to complete his loan refinance transaction, and the escrow instructions were but one document among that multitude of preprinted forms. We believe the quantity of loan and escrow documents that plaintiff was asked to sign at one time—each one of which would presumably have its own assortment of fine print or boilerplate provisions—was relevant to the issue of surprise. It is not unreasonable to expect that a single provision contained in one document may get missed or overlooked when the signing party must also work through and sign a large number of other preprinted form documents at the same time. But that was not all that was involved here. The provision was also hidden within the escrow instructions themselves. In our observation of the escrow instructions, the entirety of which were printed in a relatively small font size, the attorney fees provision was inconspicuously buried in the prolixness of the densely packed, harder to read boilerplate "GENERAL PROVISIONS" section of the last part of that form document. (See, e.g., *Pardee Construction Co. v. Superior Court* (2002) 100 Cal.App.4th 1081, 1090 (*Pardee*) [surprise shown where disputed provision was buried in the preprinted form contracts supplied by party with superior bargaining

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then and there, for his loan refinance and escrow to proceed to closure. To all appearances, it was the time for final signature(s) to be obtained on those forms. Most people would reasonably assume under such conditions (unless informed otherwise) that they would have to sign, as written, the standardized legal documents presented by a large financial institution or escrow company if they wanted the underlying transaction to be consummated. And as it conspicuously stated at the top of the escrow instructions, plaintiff was being asked to merely "SIGN AND RETURN" that document.

strength, and were difficult to read due to format and font]; *Gutierrez v. Autowest, Inc*., *supra*, 114 Cal.App.4th at p. 89 [surprise shown where disputed clause was "printed in eight-point typeface on the opposite side of the signature page of the lease" and lessee was "never informed that the lease contained an arbitration clause"].) The above described conditions were sufficient, by themselves, to adequately show surprise for purposes of procedural unconscionability.

We note further that there was nothing in the escrow instructions or otherwise that would have drawn plaintiff's attention to the specific fact that the prolixness of the preprinted, standardized form included a highly unexpected or irregular term that had never been discussed by the parties: that is, a one-sided attorney fees provision that encompassed all types of claims and exclusively benefitted defendant.[36] Although the party asserting unconscionability has the burden of proving that defense (*Woodside Homes of Cal., Inc. v. Superior Court* (2003) 107 Cal.App.4th 723, 728), it has also been held that the party who prepared and submitted a form contract containing unexpected or harsh terms has the burden of showing that the other party had notice of them (*Ellis v. McKinnon Broadcasting Co*. (1993) 18 Cal.App.4th 1796, 1804). That did not occur here.

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36 Under the circumstances as described, it would be easy to miss or misread one or more of the general provisions, notwithstanding the fact that above the signature block of the escrow instructions it stated that a party's signature "SIGNIFIES" that he or she read and understood the general provisions. The provision at issue did have a heading that read "REIMBURSEMENT ATTORNEY FEES/ESCROW HOLDER," the presence of which was one factor on the issue of surprise. (See *Pardee*, *supra*, 100 Cal.App.4th at p. 1090.) The existence of that heading arguably diminishes the overall strength of plaintiff's showing of procedural unconscionability in this case, but it is insufficient to undo it. We note further that nothing in that ordinary heading would alert the reader that the standardized provision was extreme or unusual in its content.

On this record, we conclude that plaintiff adequately established grounds for surprise as a matter of law. Therefore, the element of procedural unconscionability was satisfied and the trial court's implied finding to the contrary was in error.

2. Substantive Unconscionability

The substantive element of unconscionability "pertains to the fairness of an agreement's actual terms and to assessments of whether they are overly harsh or one-sided. [Citations.]" (*Pinnacle, supra*, 55 Cal.4th at p. 246.) This includes consideration of the extent to which the disputed term is outside the reasonable expectation of the nondrafting party and/or unduly oppressive. (*Gutierrez v. Autowest, Inc.*, *supra*, 114 Cal.App.4th at p. 88.) "Substantively unconscionable terms may take various forms, but may generally be described as *unfairly one-sided*." (*Little*, *supra*, 29 Cal.4th at p. 1071, italics added.) "A contract term is not substantively unconscionable when it merely gives one side a greater benefit; rather, the term must be 'so one-sided as to "shock the conscience."' [Citation.]" (*Pinnacle, supra*, at p. 246.) Unconscionability is measured as of the time the contract was entered. (Civ. Code, § 1670.5, subd. (a).)

We agree with plaintiff that the attorney fees provision was unfairly one-sided and well beyond the expectations of plaintiff, as the nondrafting party. This was not a *standard* attorney fees provision providing a mutual right to attorney fees to the prevailing party in an action. Rather, the provision gave to defendant alone a right to recover its attorney fees and, furthermore, that one-sided attorney fees remedy in defendant's favor extended to any type of suit or action. A customer presented with standardized escrow instructions would not reasonably expect an attorney fees provision that was *both* completely one-sided (i.e., only allowing defendant to recover its fees) and all-encompassing (i.e., including claims independent of the contractual escrow instructions, such as for alleged violations of statute or fraudulent conduct). Moreover, such one-sided attorney fees provisions imposed in adhesive contracts by the stronger party have been routinely described as oppressive by our case law. (See, e.g., *Reynolds*

Metals Co. v. Alperson (1979) 25 Cal.3d 124, 128 [noting that Civ. Code, § 1717 was enacted to prevent oppression caused by one-sided fee agreements]; *Coast Bank v. Holmes* (1971) 19 Cal.App.3d 581, 596-597 [one-sided fee provisions puts weaker party at unfair disadvantage and often used as instruments of oppression].)

For example, the unfairness or oppression created by such one-sided fee provisions was summarized in *International Billing Services, Inc. v. Emigh* (2000) 84 Cal.App.4th 1175. In that case, the Court of Appeal discussed the issue in the context of the reciprocity provision of Civil Code section 1717, as follows: "Absent the reciprocity provision, contracting parties with superior economic bargaining power would routinely insert one-sided fees provisions in contracts. In the event of a dispute, and regardless of the merits *vel non* of the disputant's claims, the drafting party would have an unfair litigation advantage from the outset: Even if it lost, it would only have to pay contract damages; if it won, the weaker party would also have to pay fees. 'One-sided attorney's fees clauses can thus be used as instruments of oppression to force settlements of dubious or unmeritorious claims. [Citations.] Section 1717 was obviously designed to remedy this evil.'" (*International Billing Services, Inc*., *supra*, at pp. 1187-1188.) Similarly, in *Coast Bank v. Holmes*, *supra*, 19 Cal.App.3d 581, the appellate court explained: "[P]arties with superior bargaining power, especially in 'adhesion' type contracts," frequently impose unilateral "attorney fee clauses for their own benefit." (*Id*. at p. 596.) "This places the other contracting party at a distinct disadvantage. Should he lose in litigation, he must pay legal expenses of both sides and even if he wins, he must bear his own attorney's fees. One-sided attorney's fees clauses can thus be used as instruments of oppression …." (*Id*. at pp. 596-597.)

We find the attorney fees provision in this case was substantively unconscionable at the time the contract was entered. It was unfairly one-sided, oppressive, and outside the reasonable expectations of the nondrafting party at that time, not only because of the unilateral advantage that it afforded to defendant, but also because it extended that one-

sided advantage to apply to all types of claims, no matter how egregious the alleged wrongdoing might be. These factors, considered on a sliding scale with the relatively strong showing on the procedural element of surprise, lead us to conclude in this case that the attorney fees provision was unconscionable and cannot be enforced.

Defendant contends the attorney fees clause is salvageable because, by virtue of Civil Code section 1717's reciprocity provision, the clause will automatically be treated as bilateral and mutual. We disagree. Section 1717 states, in relevant part, as follows: "*In any action on a contract*, where the contract specifically provides that attorney's fees and costs, *which are incurred to enforce that contract*, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be *the party prevailing on the contract*, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs." (*Id*., subd. (a), italics added.)[37] By its clear terms, section 1717 applies to actions that are based on a contract (*Federal Deposit Ins. Corp. v. Dintino* (2008) 167 Cal.App.4th 333, 357), or to claims that "sound in contract" (*Silverado Modjestka Recreation & Park Dist. v. County of Orange* (2011) 197 Cal.App.4th 282, 310), where the contract expressly provides for recovery of attorney fees. "In determining whether an action is 'on the contract' under section 1717, the proper focus is not on the nature of the remedy, but on the basis of the cause of action." (*Kachlon v. Markowitz* (2008) 168 Cal.App.4th 316, 347.) In that sense, the term "'on the contract'" is broadly construed. (*Turner v. Schultz* (2009) 175 Cal.App.4th 974, 979; see also *Douglas E. Barnhart, Inc. v. CMC Fabricators, Inc*. (2012) 211 Cal.App.4th 230, 240-241 [digesting cases construing term "'on the contract.'"].)

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37 It is not clear that Civil Code section 1717 may be used by the party responsible for drafting and imposing an unconscionable provision to salvage its enforceability against the weaker party. We do not reach that issue here, since we hold section 1717 does not apply.

Here, even broadly construed, plaintiff's actions for unfair competition and unjust enrichment were based exclusively on enforcement of a distinct statutory regulation (i.e., Gov. Code, § 8211) concerning how much a notary, as such, may charge in fees for certain services. That statute, as a regulation upon notaries for the services they perform in that capacity, comprised a duty that was independent of the parties' contract for escrow services. The escrow relationship and the contract on which that relationship was based were merely incidental to plaintiff's claims. Since plaintiff's action was not "on the contract" for purposes of Civil Code section 1717, that section did not apply here. Therefore, defendant's contention that the unconscionable attorney fees provision was fixed by section 1717 fails.

DISPOSITION

The trial court's order granting defendant's motion for attorney fees and costs is reversed. In all other respects, the judgment is affirmed. Each party shall bear their own costs.

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Kane, J.

WE CONCUR:

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Gomes, Acting P.J.

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Franso